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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-265

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

SYLVAN M. COHEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

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IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1972

No.

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

SYLVAN M. COHEN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA.

The Commonwealth of Pennsylvania, through the District Attorney of Philadelphia, respectfully requests that a writ of certiorari issue to review the judgment of the Superior Court of the State of Pennsylvania entered in the above-entitled case on March 24, 1972. The Supreme Court of Pennsylvania denied allocatur in this case on May 24, 1972.

OPINIONS BELOW.

The order of the Court of Common Pleas of Philadelphia County denying respondent's motion to quash indictments was entered September 10, 1971 in open court and is unreported. The portion of the Court's oral rulings dealing with the questions now raised on appeal is printed as Appendix A attached hereto.

The opinion and judgment of the Superior Court of Pennsylvania reversing this order is reported as *Commonwealth v. Cohen*, 221 Pa. Super. 244, 289 A. 2d 96 (1972) and is set out in Appendix B. The order of the Pennsylvania Supreme Court denying the Commonwealth's petition for allocatur is unreported and is attached as Appendix C.

JURISDICTION.

The opinion of the Pennsylvania Superior Court issued on March 24, 1972, and the Pennsylvania Supreme Court's order denying allocatur issued May 24, 1972. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

QUESTIONS INVOLVED.

1. Has not the Pennsylvania Superior Court improperly extended principles of *Miranda v. Arizona*, 384 U. S. 436 (1966) to apply to (a) an experienced attorney (b) who appears as a witness before an investigating grand jury (c) where that attorney is in fact aware of all his constitutional rights, including his right to consult an attorney and his privilege to refuse to answer questions unless directed by the Court supervising the grand jury?

2. Is it not time, especially now that Congress has enacted legislation to cure some of the unnecessary problems resulting from the *Miranda* automatic exclusionary rule, for this court to reconsider *Miranda*, at least as applied in this case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fourteenth Amendment to the United States Constitution, Section 1, provides, in pertinent part, that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

The Fifth Amendment provides that: "No person . . . shall be compelled in any criminal case to be a witness against himself."

The Omnibus Crime Control and Safe Streets Act of 1968 18 U. S. C. Sec. 3501 provides that:

ADMISSIBILITY OF CONFESSION

(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge

shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession.

STATEMENT OF THE CASE.

This case arises out of an extensive investigation conducted by a Philadelphia investigating grand jury convened in April of 1969 and directed at "a widespread system of

corruption" existing in municipal agencies dealing with Philadelphia's urban renewal efforts (R. 11a).[1] A prime focus of the investigation was the "1500 Market Street" redevelopment project. The investigating grand jury was able to conclude, in fact, that "The 1500 Market Street development project is a classic study in corruption." It found "conflict between personal gain and public duty, favoritism, influence in high places, bureaucratic incompetence, and outright fraud" (R. 221a). Heading the list of those recommended for criminal indictments was respondent, Sylvan M. Cohen, Esquire (R. 277a, 385a).

Respondent was indicted on five bills of indictment, Nos. 2887-2891, October Term, 1969, one charging a conspiracy to cheat and defraud and four bills charging a variety of direct fraudulent misrepresentations allegedly made by respondent to the Philadelphia Housing Authority while acting as agent for National Land and Investment Co., a corporation in which respondent had a very substantial interest as a director, vice-president, and indirect stockholder (R. 48a, 53a, 54a, 56a).[2] The indictments were based upon the findings of the investigating grand jury that National Land had received special treatment by the Philadelphia Housing Authority—being selected as the developer of the 1500 Market Street site without competitive bids, being excused from the requirement of a $14 million surety bond, being excused from the requirement of dedicating a strip of land to widen a sidewalk and instead being paid $600,000 therefor, being excused from the requirement of paying the $60,000 cost of relocating sewer lines, and other unprecedented preferential treatment—due to a combination of "the close personal relationship existing between Mayor

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[1] "R" refers to the 2-volume printed "RECORD" used by respondent in the court below. The quotation is from the District Attorney's petition requesting the investigation.

[2] A holding company in which respondent was a major shareholder, officer, and director held virtually all of the stock of National Land (R. 64a, 316a).

Tate and Messrs. Wolgin and Cohen [respondent], the principals of National Land" and the fraudulent misrepresentations of respondent Cohen (R. 223a, 227a, 250a). The alleged misrepresentations consisted essentially of (a) a written statement that a bond of the size required was not obtainable when in fact respondent knew that "National Land was then in the midst of negotiations with Maryland Casualty Company for such a bond, that the bond was indeed available, but that Maryland Casualty was insisting upon personal guaranties from National Land's shareholders since the total assets of National Land had been evaluated at less than $2.5 million" (R. 231a). And (b) a "pro forma" statement of net worth showing assets of National Land at $15 million and an oral statement treating a $6 million letter of credit as additional thereto, when in fact the "pro forma" statement, which was never certified although respondent was requested to do so by the executive director of the Authority, was "so substantially overstated . . . as to lead to the conclusion that it was intended that the Authority be misled" (a certified financial statement for National Land on December 31, 1968 showed a net worth of only $981,404 with a net operating loss for 1968 of $1,681,-245) (R. 250a, 232a, 11a, 118a-119a).

On March 3, 1970, respondent moved to quash the above indictments, claiming that they were based upon his testimony before the investigating grand jury (he testified on August 26 and September 30, 1969) and that he had not received warnings as to his privilege against self-incrimination or his right to counsel (R. 311a). The Court of Common Pleas denied this motion. The Court, the Honorable Joseph L. McGlynn, Jr., held that respondent's Fifth and Sixth Amendment rights were not violated because (a) respondent had been given the standard warning of his right to the assistance of an attorney before and after testifying (cf. R. 47a; also cf. R. 137a, where the assistant district attorney said: "now, I would like at this time to see if Judge Sloane is available and give you an opportunity to consult

with counsel, if you so desire." Respondent answered, "I don't have to consult with counsel right now.") and (b) respondent was in fact aware of his privilege to refuse to answer questions (unless directed by the court) so that the failure to give a warning in this respect was not constitutionally fatal but rather, at most, a superfluous omission:

> Where a person demonstrates that he has knowledge of his rights by exercising them, it seems to me it would be a useless act to require that he also be told of these rights (R. 364a).

The Pennsylvania Superior Court, after accepting an appeal from this interlocutory order under the Pennsylvania Appellate Court Jurisdiction Act of 1970, §501, 17 Purdon's Statutes Ann. §211.501, reversed this decision and ordered that the indictments against respondent be quashed. *Commonwealth v. Cohen*, 221 Pa. Super. 244, 289 A. 2d 96 (1972) (Cercone, J., for himself and Spaulding, J.; Watkins, Montgomery, and Jacobs, JJ., concurring without opinion; Wright, P. J., dissenting; and Hoffman, J., did not participate). The Court held that no amount of evidence as to an accused's knowledge of his rights excuses the lack of warnings, relying entirely upon certain language from *Miranda v. Arizona*, 384 U. S. 436 (1966), for this position.

The Pennsylvania Supreme Court denied the Commonwealth's petition for allocatur in this case on May 24, 1972.

REASONS FOR GRANTING THE WRIT.

I. THE PENNSYLVANIA SUPERIOR COURT HAS IMPROPERLY EXTENDED PRINCIPLES OF MIRANDA v. ARIZONA, 384 U. S. 436 (1966), TO (a) AN EXPERIENCED ATTORNEY (b) WHO APPEARED AS A WITNESS BEFORE AN INVESTIGATING GRAND JURY (c) WHERE THAT ATTORNEY WAS IN FACT AWARE OF ALL HIS CONSTITUTIONAL RIGHTS, INCLUDING HIS RIGHT TO CONSULT AN ATTORNEY AND HIS PRIVILEGE TO REFUSE TO ANSWER QUESTIONS UNLESS DIRECTED BY THE COURT SUPERVISING THE GRAND JURY.

This case presents the same issue as to the continuing vitality of the *Miranda* exclusionary rule that was presented in *Pennsylvania v. Ware,* October term, 1972, No. 71-964, as to which this Court granted certiorari on March 20, 1972. The writ in that case was dismissed on May 24, 1972 because of what appeared to be an adequate state ground for the lower court's decision. There is no adequate state ground for the lower court's decision in this case, which constitutes still another extension of the *Miranda* rationale.

This case concerns the voluntary testimony, given to an investigating grand jury, of a highly sophisticated, financially successful and well-known Philadelphia attorney. Upon a reading of *Miranda v. Arizona,* 384 U. S. 436 (1966), the Pennsylvania Superior Court has held that this attorney is now to be totally relieved of responsibility for this testimony. In so doing, that Court has extended *Miranda* far beyond its original concern for indigent suspects subjected to custodial interrogation. Furthermore, in so holding the Court has extended *Miranda* to infect the validity of procedures routinely employed by all investigating grand juries—a vital law enforcement tool. Cf. *Branzburg v. Hayes,* —— U. S. ——, 11 Cr. L. Rptr. 3333 (1972). Also

cf. Note, *The Grand Jury as an Investigatory Body*, 74 Harv. L. Rev. 590 (1961).

The Pennsylvania Superior Court has held that all grand jury witnesses must be given a special warning that should they be doubtful as to whether they are privileged to refuse to answer a question they can come before the presiding judge with counsel to obtain a ruling.[3] The court went further and held that this new rule must be applied irrespective of whether the witness was in fact aware of his rights in this respect. The court declared that *Miranda v. Arizona*, 384 U. S. 436 (1966), mandated this remarkable conclusion:

> The fact that appellant is an attorney did not obviate the necessity for the requisite warnings and instructions. The language of the United States Supreme Court in *Miranda v. Arizona*, 384 U. S. 436 (1966), makes clear that circumstantial evidence of the accused's knowledge of his rights based on his intelligence and education cannot take the place of the actual instruction as to his privileges. The court there stated: "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior

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[3] The Pennsylvania Superior Court did not seek in this case to disturb the well-settled rule that a witness before a grand jury has no right to have counsel present in the grand jury room. **Cf. In re Groban's Petition**, 352 U. S. 330, 332-33 (1957); also cf. **In re Grumbles**, 453 F. 2d 119 (3d Cir. 1971). But recently the court in **Commonwealth v. Columbia Investment Corp.**, —— Pa. Super. ——, —— A. 2d ——, No. 9, Oct. term, 1971 (June 23, 1972), held that where a witness was a target of the investigation he must receive full **Miranda** warnings, presumably entailing the right to counsel in the grand jury room, all this without even discussing **In re Groban's Petition, supra**, a decision of this Court directly on point to the contrary.

contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, *whatever the background of the person interrogated,* a warning at the time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." (Emphasis supplied.)

The court in *Miranda* was also clear as to the duty to advise an accused of his right to counsel regardless of circumstances indicating his knowledge of such right, saying at pages 471-472: "Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer. . . . As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right."

Commonwealth v. Cohen, 221 Pa. Super. 244, 250-51, 289 A. 2d 96, 99 (1972).

The Commonwealth submits that nothing in common sense, much less the Constitution or *Miranda* or any other decision of any other court in this country, requires that a grand jury witness must be told of something that he already knows. See *United States v. Klein*, 124 F. Supp. 476, 478 (S. D. N. Y. 1954) ("Defendants urge upon the Court that when persons who are likely to be indicted are called as witnesses before a grand jury, the United States Attorney should be required to inform them of their privilege under the Fifth Amendment. * * * However, defendants (two of whom are lawyers and all of whom were represented by counsel) do not claim that they were ignorant of the privilege, and that if they had known of it they would not have answered the questions put to them. They have failed to make any showing of fraud, duress, or deception on the

part of the Government which they contend resulted in their testifying before the grand jury. It is clear that under such circumstances, a United States Attorney is not required to inform a grand jury witness who is under suspicion of his privilege"). Also cf. *United States v. Morado*, 454 F. 2d 167, 172-73 (5th Cir. 1972); *United States v. Corallo*, 413 F. 2d 1306, 1328-30 (2d Cir. 1969); *Gallaher v. United States*, 419 F. 2d 520, 524 (9th Cir. 1969); *Robinson v. United States*, 401 F. 2d 248, 249-51 (9th Cir. 1968); *United States v. DiMichele*, 375 F. 2d 959, 960 (3d Cir. 1967), cert. den., 389 U. S. 838; *United States v. Scully*, 225 F. 2d 113, 116 (2d Cir. 1955); and *State v. Williams*, 284 A. 2d 172, 177 (N. J. 1971) (*Miranda* warnings not required for a witness before a grand jury).

The record in this case demonstrates particularly well just how purposeless the lower court's new rule is. It is undisputed that respondent was fully warned of his right to have another attorney represent him[4] and that he waived this right, as he was himself a very experienced attorney.[5] The record further shows that respondent was aware of his right to go before the judge presiding over the grand jury and obtain a ruling as to whether he must answer a given question. For, as the Hon. Joseph L. McGlynn, Jr. found,

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[4] Respondent was told by the Hon. Joseph Sloane, who administered his oath, that "he has a right to have a lawyer, he has a right to consult with his lawyer, advise with him, be guided by him, before he goes into the Grand Jury Room and after he comes out of the Grand Jury room" (R. 47a).

[5] **Id.** Also cf. R. 62a (respondent admitted to the bar in 1939 and a senior partner in the law firm Cohen, Shapiro, Berger, Polisher, and Cohen) and R. 91a (". . . I've been practicing law for almost thirty-one years and have a pretty good record and reputation at the Bar.").

respondent demonstrated knowledge of this right by actually exercising it (R. 363-64a).[6]

Thus, to hold as the lower court has held is to capriciously give a windfall to a defendant whose substantive rights were in no way violated. The arbitrariness and artificiality of the court's position is revealed by even a little thought. For if an indigent defendant had been allowed to consult with respondent while testifying, he would have no complaint nor could any court rationally hold that he was deprived of his rights to counsel and to his privilege against

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[6] Respondent invoked this right in relation to a question as to a statement he had made to the press that the District Attorney's office had attempted to have witnesses perjure themselves before the grand jury. When respondent was asked to name the individuals he was talking about he initially responded that he thought it was not relevant to the investigation and that he did not want to involve third parties (R. 132a). When the obvious relevance of his allegations was pointed out to him, respondent finally replied, "Mr. Sprague [First Assistant District Attorney], I understand perfectly what you are saying. I think my statement is very clear, and **if a Court orders me to do so, I will do it, but until such time, I won't**" (R. 133a; emphasis supplied). Respondent was then asked, "You refuse to answer that question, not on any basis of the Fifth Amendment or any plea of privilege, but just that you don't believe that is within the scope of this Grand Jury's investigation?" Respondent replied affirmatively (R. 135-36a). The First Assistant District Attorney then told respondent, "Now, I would like at this time to see if Judge Sloane is available and give you an opportunity to consult with counsel, if you so desire." Respondent answered, "I don't have to consult with counsel right now" (R. 137a).

Judge Sloane was contacted and while a courtroom was being made available, respondent was asked questions relating to other subjects (R. 142a, 173a), with the exception of one question as to whether he had told anyone else of the alleged attempt by the District Attorney's office to suborn perjury (to which he initially replied that he had told no one and then changed his answer to no one but "Counsel.") (R. 174a).

Upon returning from Judge Sloane the following occurred:

BY MR. SPRAGUE:

Q. Let me state that we met with Judge Sloane and advised him as to what had transpired. Judge Sloane said that he will not order Mr. Cohen to answer those two questions, that it is agreed that I may state to you that where the statement had been made and it has not been followed up by naming such individuals, he takes it that it was never made in the first place. And Judge

self-incrimination.[7] Yet respondent, an experienced attorney, receives greater protection than such an indigent.[8] To borrow some appropriate language from the late Mr. Justice Harlan (dissenting in *Miranda*), "One is entitled to feel astonished that the Constitution can be read to produce this result." 384 U. S. at 518.

If we have come so far from reason and if it is indeed true that the *Miranda* decision requires that a witness before an investigating grand jury must be told of something he already knew, then *Miranda* should be modified or overruled. For it is quite simply not a necessity of "due process" that an attorney who, the record shows, is fully aware of all his constitutional rights, must be told of his well-known rights

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Sloane stated that I may give you his comment in not ordering Mr. Cohen to answer this question.

Have I been accurate?

A. Yes, that is accurate.

(R. 216a.)

[7] Cf. **Miranda v. Arizona**, 384 U. S. 436, 466 (1966):

The presence of counsel, in all of the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

[8] Although some courts have held that the fact that an accused is an attorney does not necessarily indicate that he is capable of adequately defending himself, all of these cases involved either a custodial police interrogation, **United States v. Miller**, —— F. Supp. ——, 11 Cr. L. Rptr. 2053 (E. D. Wis. 1972), or an actual trial, **United States v. Harrison**, 451 F. 2d 1013 (2d Cir. 1971) and **Glasser v. United States**, 315 U. S. 60 (1942), and are, therefore, readily distinguishable from the present case. For in this case, respondent was not held in the so-called "inherently coercive" atmosphere of the stationhouse, but was instead fully aware that at any time he could seek, with counsel, a ruling from the judge who was presiding over the grand jury. Nor was respondent required to make the kind of legal judgments that must be made at trial—what witnesses to call, whether to object to the admissibility of evidence, whether to plead guilty, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions to make (demurrer, etc.), and an infinite variety of other complex strategic decisions that are not made before a grand jury.

and privileges. To apply an exclusionary rule to such a case via the due process clause is to utterly misconceive the appropriate function of that guarantee. As stated by this Court in *United States v. Augenblick*, 393 U. S. 348 (1969) (Mr. Justice Douglas writing for a unanimous Court):

> But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, as in Moore v. Dempsey, supra, that the proceeding is more a spectacle (Rideau v. Louisiana, 373 U. S. 723, 726, 83 S. Ct. 1417, 1419, 10 L. Ed. 2d 663) or trial by ordeal (Brown v. Mississippi, 297 U. S. 278, 285, 56 S. Ct. 461, 464, 80 L. Ed. 682) than a disciplined contest.

Id. at 356. No such breakdown of "due process" occurs when an attorney who appears as a grand jury witness is not told of a right of which he is fully aware.

II. IF MIRANDA REQUIRES THE CONCLUSION REACHED BY THE COURT BELOW, IT MUST BE MODIFIED OR OVERRULED.

The lower court's decision in this case is only one in a virtual sea of cases where perfectly voluntary statements and evidence obtained therefrom are stricken down because some formalistic and often meaningless ritual,[9] either full *Miranda* warnings or some variation thereof, was not performed. This situation is intolerable.

The *Miranda* decision has not worked out well or, certainly, as contemplated. See generally F. Graham, *The Due Process Revolution: the Warren Court's Impact on Criminal Law* (1970). It has not led to fewer cases dealing with the

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[9] Cf. Note, **Interrogations in New Haven: the Impact of Miranda**, 76 Yale L. J. 1519, 1536, 1563 (1967) and Note, **A Postscript to the Miranda Project: Interrogation of Draft Protesters**, 77 Yale L. J. 300 (1967).

voluntariness of confessions; rather, it has led to a proliferation of cases dealing with innumerable hypertechnical questions of law, questions of law that have nothing to do with the true voluntariness of a statement.[10] Far worse,

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[10] It would be virtually impossible to chronicle completely the manifold questions of this kind which have arisen in the interpretation of **Miranda**. *Cf.* Note, **Necessity of Informing Suspect of Rights Under Privilege Against Self-Incrimination Prior to Police Interrogation**, 10 A. L. R. 3d 1054, supp. p. 22: "Comment Note. Neither in this note nor in the Later Case Service therefor is there any attempt at an exhaustive citation of cases." Also cf. the ten full pages of Shephard's United States Citations where **Miranda** was cited in published opinions alone. Suffice it to say that entire books could be and have been written about such technicalities. Cf., e.g., National District Attorneys Association, **Confessions and Interrogations After Miranda: a Comprehensive Guideline of the Law** (1970).

Several Pennsylvania cases are illustrative of the conflicting views on such issues. In **Commonwealth v. Singleton**, 439 Pa. 185, 266 A. 2d 753 (1970), the Pennsylvania Supreme Court held that it was no longer sufficient to tell an accused that anything he said could be used for or against him; he must now be told that anything he says can "and will" be used against him in court (even though it may not always be true that a statement will be introduced in evidence against a defendant). At least the latter part of this rule has been uniformly rejected by federal and state courts throughout the country. See, e.g., **United States v. Cook**, 432 F. 2d 1093, 1106 (7th Cir. 1970); **United States v. Kershner**, 432 F. 2d 1066, 1071 (5th Cir. 1970); **Davis v. United States**, 425 F. 2d 673 (9th Cir. 1970); **Morris v. State**, 184 S. E. 2d 82 (Ga. 1971); **State v. Hollingshead**, 191 N. W. 2d 680 (Iowa 1971); **People v. Ruppuhn**, 180 N. W. 2d 900 (Mich. App. 1970); **State v. Briggs**, 469 P. 2d 730 (N. M. App. 1970); **State v. Davis**, 172 S. E. 2d 569 (W. Va. 1970); and **Quinn v. State**, 183 N. W. 2d 64 (Wis. 1971). In **Commonwealth v. Collins**, 436 Pa. 114, 259 A. 2d 160 (1969), three members of the Pennsylvania Supreme Court stated: "We agree with appellant that an intelligent and understanding waiver of the right to counsel is impossible where the defendant has not been informed of the crime which is being investigated." **Id.** at 121. But in **Commonwealth v. Cooper**, 444 Pa. 122, 278 A. 2d 895 (1971), the Court explicitly disavowed **Collins**, stating that "it is unnecessary to **specifically** inform defendant of the **exact** crime for which he was being investigated or with which he was charged." **Id.** at 125. Also cf. cases dealing with the issue of whether a murder suspect must be told of the felony-murder rule or that the victim has died, e.g., **State v. McRae**, 172 S. E. 2d 37 (N. C. 1970) and **Satterfield v. Boles**, 297 F. Supp. 609, aff'd, 408 F. 2d 1029 (4th Cir. 1969), contra, **Beck v. State**, 235 N. E. 2d 699 (Ind. 1968). In **Commonwealth v. Marsh**, 440 Pa. 590, 271 A. 2d 481 (1970),

however, as the late Mr. Justice John M. Harlan predicted, the *Miranda* Court's "hazardous experimentation" (384 U. S. at 517) has inflicted great harm upon both the general public and even those suspected of crime.

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the Pennsylvania Supreme Court struck down a warning which followed precisely that set forth in **Miranda** itself on the theory that the words "free counsel" were not used. The Court did so without even citing **Commonwealth v. Franklin,** 438 Pa. 411, 265 A. 2d 361 (1970), where the same Court in the same year had unanimously approved the same warning! Also cf. **Commonwealth v. Wood,** 219 Pa. Super. 35, 275 A. 2d 859 (1971), where the Pennsylvania Superior Court, without citing either **Marsh** or **Franklin,** simply followed the **Miranda** decision on this question. See also **Irvin v. State,** 246 So. 2d 592 (Fla. App. 1971) and **State v. Fairley,** 255 So. 2d 83 (La. 1971), for cases following the **Franklin** position.

The courts have also split widely on several other questions having nothing whatever to do with the voluntariness of confessions, e.g., whether **Miranda** warnings are required for a drunk driver or one stopped for some other traffic offense, cf. Note, **Right of Motorist Stopped by Police Officers for Traffic Offense to be Informed at that time of his Federal Constitutional Rights Under Miranda v. Arizona,** 25 A. L. R. 3d 1076 (1969); whether **Miranda** warnings are required for a taxpayer being interviewed by an IRS agent, see **United States v. Dickerson,** 413 F. 2d 1111 (7th Cir. 1969), contra, **United States v. Jaskiewicz,** 433 F. 2d 415 (3d Cir. 1970) (citing cases in the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits), but cf. **United States v. Leahey,** 434 F. 2d 7 (1st Cir. 1970) (which fashioned an exclusionary rule around an IRS guideline requiring an agent to state that he has the function of investigating the possibility of criminal tax fraud), contra, **United States v. Luna,** 313 F. Supp. 1294 (W. D. Tex. 1970); whether **Miranda** applies to misdemeanors, compare **State v. Gabrielson,** 192 N. W. 2d 792 (Iowa 1971), with **Commonwealth v. Bonser,** 215 Pa. Super. 452, 258 A. 2d 675 (1969); whether it applies to grand jury proceedings, compare the three different views set forth in **Commonwealth v. McCloskey,** 443 Pa. 117, 277 A. 2d 764 (1971); **Commonwealth v. Columbia Investment Corp., supra,** note 3, and **United States v. DiMichele,** 375 F. 2d 959 (3d Cir. 1967); whether **Miranda** applies to "consent searches," see **United States ex rel. Harris v. Hendrick,** 423 F. 2d 109 (3d Cir. 1970) and **United States v. Resnick,** 455 F. 2d 1127 (5th Cir. 1972), but see **Perkins v. Henderson,** 418 F. 2d 441 (5th Cir. 1969); whether **Miranda** warnings are required in an infinite variety of on-the-street questioning situations, cf. NDAA book on **Confessions, supra,** at 6-40; whether there is a valid waiver where police read only the "advice" side of the warnings card and defendant says he understands his rights and talks, see **United States v. Boykin,** 398 F. 2d 483, 484 (3d Cir. 1968), cert. den., 393 U. S. 1032 (1969) and **Bond v. United States,** 397 F. 2d 162, 164-65 (10th Cir. 1968), cert. den.,

That a certain number of confessed criminals are set free upon society without rehabilitation is only the most obvious cost of the automatic exclusionary rule attached to the *Miranda* warnings.[11] Less obvious but equally dele-

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393 U. S. 1035 (1969) (a case which refused to follow an earlier decision of a different panel in the same circuit going the other way); whether there is a valid waiver where defendant orally waives his rights but refuses to sign the warnings card, see **United States v. Stuckey,** 441 F. 2d 1104 (3d Cir. 1970) and **United States v. Crisp,** 435 F. 2d 354 (7th Cir. 1970), but see **Frazier v. United States,** 419 F. 2d 1161 (D. C. Cir. 1969); how far **Miranda** warnings carry over, cf. **Commonwealth v. Abrams,** 443 Pa. 295, 278 A. 2d 902 (1971); whether they have come too late, cf. **Commonwealth v. Murphy,** 219 Pa. Super. 459, 281 A. 2d 685 (1971) and **Government of Virgin Islands v. Malone,** 457 F. 2d 548, 549 (3d Cir. 1972); whether an initial invocation of rights forever precludes a later waiver, compare **Commonwealth v. Jefferson,** 445 Pa. 1, 281 A. 2d 852 (1971); **United States v. Brady,** 421 F. 2d 681 (2d Cir. 1970); **State v. Bishop,** 158 S. E. 2d 511 (N. C. 1968), and **Fellows v. State,** 283 A. 2d 1 (Md. App. 1971), with **People v. Fiorrito,** 441 P. 2d 625 (Cal. 1968); and innumerable constantly recurring questions of what constitutes "custody" and "interrogation" and intelligent waiver. Cf. Pitler, **"The Fruit of the Poisonous Tree" Revisited and Shepardized,** 56 Cal. L. Rev. 579, 602 (1968): "It appears that the waiver will be judged by the voluntariness standard and may become as difficult to apply as the old standard." See also the statement of Professor James Vorenberg of Harvard Law School quoted in F. Graham, **The Due Process Revolution, supra,** at 183 (**Miranda** "just moves the battleground from the voluntariness of the confession to the voluntariness of the waiver.").

[11] See Graham, **supra,** at 185: "No one knows how many of these cases have occurred, but whenever they have found their way into print, they have made striking headlines: 'Bronx Man Who Admitted Rape Set Free Under Miranda Ruling'; 'Confessed Slayer of Wife and 5 Children Freed'; 'Two Who Confessed Go Free in Slaying'; 'Illegal Confession Frees Mother Here in Slaying of Boy, 4'; and 'Miranda Rule Voided 72 Maryland Confessions.' "

Despite the **Miranda** Court's erstwhile hope that its new rule would encourage the police to seek other evidence of an accused's guilt (384 U. S. at 481), it remains true that confessions are often the only sufficient evidence in a case, any other evidence either being insufficient alone or, more likely, being "fruit of the poisonous tree." Cf. **Wong Sun v. United States,** 371 U. S. 471 (1963). Furthermore, as stated by Justice Schaefer of the Illinois Supreme Court: "It is difficult to know just what other evidence he [Dean Wigmore] had in mind. Of course there are scientific methods of crime detection, but every criminal does not leave fingerprints, and ballistics testimony is

terious consequences exist, some of these consequences being endemic to any exclusionary rule such as *Miranda* which does not go to the integrity or fairness of the truth-determining process or otherwise concern fundamental due process rights.[12] In fact, it is now becoming generally conceded that such a rule is a "cure" far worse than the disease. This is especially true where, as here, there are adequate safeguards for an accused's constitutional rights (in the traditional "voluntariness" test) without resort to such an additional exclusionary rule.

To start with, no remedy is provided which will act as an effective control over police behavior, essentially because

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not involved in many cases. Heavier emphasis upon identification testimony seems undesirable to me, because my experience leads me to distrust that kind of evidence." (Footnote omitted.) Schaefer, **Police Interrogation and the Privilege Against Self-Incrimination**, 61 N. W. U. L. Rev. 506, 509 (1966).

Finally in this regard, it may be noted that it is also still true that not all police and detectives have developed the legal ability to anticipate the next 5 to 4 decision of a court on one of the many issues that continue to arise as to whether warnings are required, cf. note 10, **supra**, and hence they do not always know when they are supposed to give warnings. Hence, they make mistakes. Hence, confessed criminals continue to be set free despite the best efforts of even the most intelligent law enforcement officers. See Graham, **supra**, at 311: "Despite the Court's painstaking efforts to anticipate all eventualities, situations continue to happen that expose the inherent difficulties of refusing to consider peculiar circumstances that might excuse a failure to give all of the warnings." Also cf. Traynor, **The Devils of Due Process in Criminal Detection, Detention, and Trial**, 16 Cath. U. L. Rev. 1, 14 (1966): "There is more of Lucifer than of ludiferousness in a rule that compels a police officer, even under emergency conditions, to make so finespun a determination." (The author is here referring to the "focus" test of **Escobedo v. Illinois**, 378 U. S. 478 (1964).) It may be noted that Chief Justice Traynor was the author of **People v. Dorado**, 398 P. 2d 361 (Cal. 1964), cert. den., 381 U. S. 937 (1965), the California Supreme Court case that anticipated **Miranda**, but he so held only because of what he felt was the compulsion of **Escobedo**, actually disagreeing with the inflexible rule set forth in **Escobedo** (although he did not quarrel with its result under the old voluntariness test). **Id.** at 12-13.

[12] Compare, e.g., **Rochin v. California**, 342 U. S. 165 (1952); **Gideon v. Wainwright**, 372 U. S. 335 (1963); **Price v. Georgia**, 398 U. S. 323 (1970), and **Morrissey v. Brewer**, —— U. S. ——, 11 Cr. L. Rptr. 3324 (1972).

of the simple reason that it is extremely difficult to control the conduct of person A (the police) by threatening to punish person B (the public). Cf. Graham, *supra*, especially at 134-36. Also cf. ABA Project on Standards for Criminal Justice, Standards Relating to *The Urban Police Function* (tentative draft, 1972) at 150-58.[13] Moreover, studies show that police and detectives have a markedly negative attitude toward this kind of exclusionary rule,[14] sometimes lying in court in order to avoid its imposition. See e.g., Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 739-42 (1970); Grano, *A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury*, 1971 U. Ill. L. F. 405, 408-11; and Graham, *supra*, at 137:

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[13] Nor, obviously, does an aggrieved innocent person have any more direct a remedy under such a rule, for he cannot take much satisfaction from the fact that he has a "right" to suppress nonexistent incriminating evidence at his nonexistent trial.

[14] See Robinson, **Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires: A Construct of Police Capacity to Comply**, 1968 Duke L. J. 425, 521. See also Note, **Interrogations in New Haven: The Impact of Miranda**, 76 Yale L. J. 1519, 1610 (1967): "Some of the detectives responded to **Miranda** by taking a more negative attitude toward their work. They combined their resignation toward the decision with an attitude that if the Court was going to make their job more difficult, they would let the judges figure things out for themselves." Also cf. Stephens, **Police Interrogation and the Supreme Court: An Inquiry Into the Limits of Judicial Policy-Making**, 17 J. Pub. L. 241 (1968).

Particularly frustrating to the police are those cases where through sheer inadvertence or inability to anticipate a new decision, a conviction is thrown out. It is doubtful, e.g., that when a confessed four-time murderer such as Paul D. Ware is allowed to walk away from court because the police failed to give him **Miranda** warnings in 1963, cf. **Commonwealth v. Ware**, 446 Pa. 52, 284 A. 2d 700 (1971), writ dismissed as improvidently granted, —— U. S. —— (1972), also cf. **Daily News**, April 24, 1972, "Court Reversal to Free Confessed Killer of Four" (front-page headline), the arresting officer or assigned detectives actually learn any particular lesson, unless, unfortunately, it is to do what led to a civil rights case in **United States v. Delerme**, 457 F. 2d 156 (3d Cir. 1972) (officer chased a traffic offender through town and upon apprehending him summarily "punished" him with a beating).

> Only the most prophetic policeman would have had the vision, before the Court announced its detailed, four-point warning, to recite exactly that warning before questioning a suspect. Yet a number of confessions that had already been obtained by the police were admitted into evidence in post-*Miranda* trials, based on the officers' statements that a complete *Miranda*-type warning had been given.

Also, cf. *Sheer v. United States*, 414 F. 2d 122 (5th Cir. 1969) (held, without quoting the warnings given, that the testimony supported the conclusion that defendant had received "substantially" the same warnings as later required by *Miranda); Evans v. Swenson*, 455 F. 2d 291 (5th Cir. 1972) (held that the police officer on May 15, 1966 had given the full *Miranda* warnings "in substance"); and *State v. Travis*, 231 A. 2d 205 (N. J. 1967) (another pre-*Miranda* confession case where the court upheld the trial court's finding that the prosecution witnesses' testimony that they had given *Miranda* warnings was "vague, inconsistent, and lacked candor.").[15]

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[15] An informal survey of detectives and police in Philadelphia leads this writer to conclude that suspects are virtually never given warnings on the street, although this writer can recall at least two records of suppression hearings where, when asked by defense counsel, the arresting officer testified to the giving of warnings at such a time. Perhaps one reason that warnings are not given in street questioning is that much of such questioning occurs at night and if the officer were to be sure that he was giving the latest approved version of the warnings he would have to look at his warnings card, an act that might be his last. Cf. **United States v. Thompson**, 420 F. 2d 536 (3d Cir. 1970) (defendant tried to go for a gun while he was in a car); **Commonwealth v. Hoss**, 445 Pa. 98, 283 A. 2d 58 (1971) (defendant in car succeeded in going for his gun and shot the arresting officer, who had just given **Miranda** warnings, dead); **Wilson v. Porter**, 361 F. 2d 419 (9th Cir. 1966); **State v. Boone**, 277 A. 2d 414 (N. J. App. 1971); and **Philadelphia Inquirer**, Jan. 4, 1972, at 2, col. 1 (**"125 Police Officers Slain in 1971. * * * 24 officers died answering robbery calls, . . . 20 during traffic-law stops, . . . 9 were investigating suspicious persons or situations, 7 were responding to burglary calls, 9 were handling public disturbances, . . . and 22 died while trying to arrest persons for crimes other than robbery or burglary.").

One experienced trial judge, Judge Joseph G. Kennedy, has concluded that,

> Whether they [the police] did [give *Miranda* warnings] or not is a matter of evidence,[16] so you're back where you were before *Miranda*. The only place that these decisions have made any perceptible effect is that it has slowed down the judicial process.[17]

Graham, *supra*, at 292.

Furthermore, to the extent that the aforementioned perjury at suppression hearings is a problem,[18] it, in turn, has consequences debilitating to the entire criminal justice system. For example, what of the defendant who knows that an officer has lied at his suppression hearing? Isn't he likely to feel, rightly or wrongly and whether the lie was material or not, that the only reason he is in jail is because

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[16] And as Professor Vorenberg quips, the police "have done pretty well with these swearing contests over the years." Graham, **supra**, at 183.

[17] It is not uncommon, in fact, for the endless suppression hearings in a case to last longer than the trial itself. See, e.g., **Commonwealth v. Thomas**, 444 Pa. 436, 282 A. 2d 693 (1971) (814 pages of suppression hearing over 7 days; 768 pages for a 5-day trial, much of even the trial consisting of a renewed attack before the jury on the issue of whether **Miranda** warnings were given). Also see Graham, **supra**, at 291. Also cf. Friendly, **Is Innocence Irrelevant? Collateral Attack on Criminal Judgments**, 38 U. Chi. L. Rev. 142, 148 (1970): "Everyone concerned with the criminal process, whether his interest is with the prosecution, with the defense, or with neither, agrees that our greatest single problem is the long delay in bringing accused persons to trial." (Footnote omitted.)

[18] And, according to one commentator, "The desire not to lose a conviction that may represent weeks or months of hard work often leads to an almost irresistible impulse to alter facts when necessary, especially if it seems that the only obstacle to conviction is a technicality." **Grano, supra**, at 410.

That law enforcement officers may sometimes lie in court is not, of course, a reason to do away with all hearings where they would have to testify. The point is simply that an exclusionary rule such as **Miranda** which is not directed at insuring the integrity of the truth-determining process inevitably increases the likelihood of police perjury.

of some policeman's perjury? And what happens to the chances of rehabilitating an individual who feels this way? Further, a cavalier attitude toward lying in court can only tend to make the police, upon whom society has placed "an intolerable burden,"[19] more susceptible to even worse forms of corruption. See Cohen, *Police Perjury: An Interview With Martin Garbus,* 8 Cr. L. Bul. 363 (1972). Indeed, the *Miranda* exclusionary rule may well cause the police (and even the general public![20]) to feel that if defendants can get away with murder, why shouldn't they get away with a little petty larceny? Cf. *N. Y. Times,* Oct. 23, 1971, at 1, col. 2: "Patrolman Says 'All But 2' Of Colleagues Got Bribes;" *Philadelphia Inquirer,* Nov. 16, 1971, front-page headline: "Wide Police Corruption Revealed;" *Philadelphia Inquirer,* July 12, 1972, at 1, col. 1: "Indictment of 6 Asked in 'Payoff'" (4 narcotics officers allegedly agreed, for a sum of $5000, to let go a defendant found with $10,000 worth of methadrine; a co-defendant agreed to be arrested since a call had already been made to headquarters, one of the officers testifying in court that only the co-defendant was found in the raid further perjurying himself by giving inadequate testimony to properly convict even the co-defendant); *Philadelphia Inquirer,* July 14, 1972, at 6, col. 3: "D. A. Continues Probe in Arrest of Detectives on Bribe Charges" (a different set of detectives from that described above); and *Philadelphia Inquirer,* July 14, 1972, at 13, col. 6: "Marker [an ex-police officer] Gets 2-Year Term in Drug Case."

Some of the other untold costs that society has paid for the *Miranda* rule are hinted at by Judge Friendly in a pre-*Miranda* article:

> Does the sixth amendment truly command that interrogation as to the whereabouts of the stolen goods must cease until the suspect is able to communicate with his counsel or one is appointed for him—with the

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[19] **Grano, supra,** at 410.

[20] **Cf. Graham, supra,** at 293.

> near certainty that this will be the end of all interrogation and that confederates will swiftly disappear with the loot? Kidnapping raises the issue still more poignantly. If such a tragedy were to strike at the family of a writer who is enthused about extending the assistance of counsel clause to the stationhouse, would he really believe the fundamental liberties of the suspect demanded the summoning of a lawyer, or at least a clear warning as to the right immediately to consult one, before the police began questioning in an effort to retrieve his child? There is the common situation, already intimated, where one criminal has been caught in the net but other suspects are on the loose and will have been alerted by his arrest. However the case may stand after indictment, does the sixth amendment require the police to postpone interrogation at the moment of arrest at the cost of sacrificing effective opportunity for capture? (Footnotes omitted.)

Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. 929, 948-49 (1965).

If all these disastrous consequences were offset by substantial benefits to the accused, perhaps the *Miranda* exclusionary rule could be justified as an exercise of this Court's supervisory power. But while both guilty and innocent persons are less likely to make statements post-*Miranda*, studies show that suspects generally continue to waive their rights and that the warnings have little effect, by no means guaranteeing that any so-called "inherent coercion" is removed. Cf. note 9 *supra* and Graham, *supra*, at 314. Furthermore, *Miranda* has not prevented the police from continuing all the very practices which the Court condemned in *Miranda*. See Graham, *supra*, at 315-16. If anything, what little evidence exists suggests that *Miranda* may have actually aggravated some of these problems. Cf. note 14 *supra* and Oaks, *supra*, at 750-52. Thus, hard experience shows that there is no easy substitute for the case-by-case adjudication of the voluntariness of each confession.

In sum, even assuming that *Miranda* warnings are desirable as a matter of legislative policy,[21] and even assuming further that the unsupported "*ipse dixit* of the majority" in *Miranda* (Clark, J., dissenting, 384 U. S. at 500) as to the supposedly "inherently coercive" atmosphere of *all* custodial interrogation were correct,[22] it does not follow that

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[21] But see Schaefer, **Police Interrogation and the Privilege against Self-Incrimination,** 61 N. W. U. L. Rev. 506, 507 (1966) and **Escobedo v. Illinois,** 378 U. S. 478, 495-96 n* (1964) (White, J., dissenting), where a noted English commentator is quoted as offering the following explanation as to why the English no longer use an exclusionary rule: "Perhaps the truth is that the Rules have been abandoned, by tacit consent, just because they are an unreasonable restriction upon the activities of the police in bringing criminals to book."

[22] It is indeed this "ipse dixit" that constitutes the sole leg on which the **Miranda** decision rests. That it finds scant support in the Constitution is demonstrated by an examination of the Fifth Amendment itself, which, in spite of—or perhaps because of—all that has been written about it, may be set forth verbatim: "No person . . . shall be **compelled** in any criminal case to be a witness against himself." (Emphasis added.) Also cf. White, J., dissenting in **Miranda,** 384 U. S. at 532-37; Friendly, **The Bill of Rights as a Code of Criminal Procedure,** 53 Cal. L. Rev. 929, especially at 940-49 (1965) and **Bram v. United States,** 168 U. S. 532, 558 (1897), the principal case upon which the majority in **Miranda** relied: "In this court also it has been settled that the mere fact that the confession is made to a police officer, while the accused was under arrest in or out of prison, or was drawn out by his questions, does not necessarily render the confession involuntary, but, as one of the circumstances, such imprisonment or interrogation may be taken into account in determining whether or not the statements of the prisoner were voluntary." (Quoted by White, J., dissenting in **Miranda,** 384 U. S. at 528.) Compare Kamisar, **A Dissent From the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test,** 65 Mich. L. Rev. 59 (1966). Professor Kamisar, although expressing no opinion on the validity of **Miranda** itself, argues that at least the Fifth Amendment applies to pre-trial stages. But running throughout his analysis is the rather disturbing casual use of the catch-phrase "the privilege." While the sources relied upon by Professor Kamisar uniformly use the words "compel" and "compelled" as is found in the Fifth Amendment itself, the author just as routinely in text reverts, somewhat carelessly, to only "the privilege." Cf. **id.** at 64, 65, 66, 69, 71, 72, 73, 78, 81, 82, 83, 92, and 93.

the exceedingly clumsy and deletorious "remedy" of an exclusionary rule must be fashioned upon such a policy as somehow a requisite of Fourteenth Amendment "due process." See *Apodaca v. Oregon*, —— U. S. ——, ——, 92 S. Ct. 1628, 1635 (1972) (Blackmun, J., concurring) ("Our task here, however, is not to pursue and strike down what

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Miranda cannot be properly explained as simply an overextension of the Fifth and Sixth Amendments combined with an oversimplistic application of the waiver doctrine. See **Hoffa v. United States**, 385 U. S. 293 (1966); **Kirby v. Illinois**, —— U. S. ——, 11 Cr. L. Rptr. 3072 (1972). Note, **Waiver of Rights in Police Interrogations: Miranda in the Lower Courts**, 36 U. Chi. L. Rev. 413, 417 (1969) ("The standards for waiver of a constitutional right are inseparable from the definition of the right, although the Court has often spoken of a monolithic concept of waiver applicable to all constitutional rights."); and Friendly, **The Bill of Rights, supra**, at 942 n. 70:

> Logic tells us that if the state is not bound to furnish counsel on the street or at the station house or even to allow immediate access by retained counsel in every case, it is under no constitutional compulsion to warn with respect to this nonexistent right. But logic does not compel the converse, although that often appears to be supposed. Thus, if a suspect has an absolute right to call retained counsel immediately on arrival at the station house under all circumstances, it still would not be an inevitable consequence that the state must affirmatively advise him to that effect, even though it must do so with respect to the aid of counsel at plea or trial; the Bill of Rights might be thought to take a neutral attitude at this stage and be satisfied if the state does not frustrate him. The contrary view amounts to saying that all rights held to be derived from the Constitution are so vital that the state must not merely respect them if asserted but affirmatively apprise the ignorant of them, or—perhaps mainly a different phrasing—that they persist unless "waived" and warning is usually necessary to make out a waiver, at least in the case of the ignorant. I fail to understand why a decision to put these rights beyond the possibility of abolition or denial should necessarily carry all this in its train. In my view any such principle, like the exclusionary rule, would be a judicial gloss on the rights protected by the amendments; decision to impose such a gloss with respect to the right in one context, for example, to counsel at plea or trial, would not necessarily demand similar imposition in another; and some leeway on such matters could well be left to the states.

One of the difficulties with the very slippery waiver doctrine is that its unthinking application can indeed lead to confusion between the real meaning of the right involved and the separate question of whether an individual has a right to be told of the particular right.

happens to impress us as undesirable legislative policy."). Also cf. generally Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. 929 (1965), for a brilliant dissection of the "selective incorporation" doctrine.

A much more sensible approach to the problems in this area was taken by the United States Congress in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U. S. C. §3501, which provides:

> ADMISSIBILITY OF CONFESSION
>
> (a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of volun-

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For instance, while an accused undoubtedly has a right not to have a confession beaten from him, no court has held that he must be told this (either pre- or post-**Miranda**). Also cf. **Barker v. Wingo**, —— U. S. ——, ——, 11 Cr. L. Rptr. 3174, 3179 (1972) ("We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.") and **United States ex rel. Harris v. Hendrick**, 423 F. 2d 109 (3d Cir. 1970).

Nor is there any viable equal protection argument to be made in the **Miranda** context. As stated by one court,

> There is no right to escape detection. There is no right to commit a perfect crime or to an equal opportunity to that end. The Constitution is not at all offended when a guilty man stubs his toe. On the contrary, it is decent to hope that he will. Nor is it dirty business to use evidence a defendant himself may furnish in the detectional stage. * * * As to the culprit who reveals his guilt unwittingly with no intent to shed his inner burden, it is no more unfair to use the evidence he thereby reveals than it is to turn against him clues at the scene which a brighter, better informed or more gifted criminal would not have left.

State v. McKnight, 243 A. 2d 240, 252 (N. J. 1968). Indeed, the Court in **Miranda** did not even attempt to employ an equal protection mode of analysis in reaching its decision.

tariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances.

(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised *or knew* that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession. (Emphasis added.)

The Act adopts essentially the same kind of rule as that employed in England, where the English Judges' Rules are treated as "administrative directions" which "merely set forth an exemplary standard." Note *Developments in the Law—Confessions*, 79 Harv. L. Rev. 935, 1093, 1095 (1966). Under the English rule, the failure to give warnings is only a factor to be considered at a suppression hearing, so that while peace officers still have an incentive to give warnings, a failure in this respect is not necessarily fatal to the admissibility of the statement.

Further, under this Congressional test, suppression of otherwise voluntary testimony is not mandatory where, as in this case, the defendant actually knew of his rights.

Although this statutory rule is different from the automatic exclusionary rule of *Miranda*, this difference is not one of constitutional dimension. See *Johnson v. Louisiana*, —— U. S. ——, 92 S. Ct. 1620, 1626 (1972) ("We remain unconvinced by anything appellant has presented that this legislative judgment was defective in any constitutional sense."). In fact, not only is the above enactment in total harmony with the Fifth Amendment self-incrimination clause and in complete accord with the Fourteenth Amendment due process clause, it is an improvement over the strict "doctrinaire rules" of *Miranda*. (Clark, J., dissenting in *Miranda*, 384 U. S. at 501.)

The Court in *Miranda* itself declared that, "we cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted." 384 U. S. at 467. Now the United States Congress, with the benefit of having heard extensive testimony from judges, prosecuting attorneys, and scholars concerning the effects of *Miranda* and much more extensive and representative testimony as to the nature of custodial interrogation than the *Miranda* Court had available,[23] has accepted the Court's invitation to legislate procedural reforms in this area by passing the above legislation.

The Act's guidelines are a better test of voluntariness than *Miranda* itself in that they draw objective attention to the entire interrogation proceedings, rather than just the warnings.[24] In this sense, they go further than the test of voluntariness extant up to the time of *Escobedo* and *Miranda*—whether the suspect's "will was overborne." *Procunier v. Atchley*, 400 U. S. 446, 453 (1971). But the statute

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[23] See 1968 U. S. Code Congressional and Administrative News, at 2112-38.

[24] As it is, the courts tend to look upon the giving of warnings as the talisman that wards off all other evils—including all the things with which the Miranda Court was most concerned. Cf. Commonwealth v. Moore, 444 Pa. 24, 279 A. 2d 146 (1971) and Graham, supra, at 316.

does not arbitrarily exclude statements just because the warnings given were not minutely compatible with the courts' ever-changing interpretations of the formalistic *Miranda* requirements.

Everyday experience with the *Miranda* decision and the problems it has created indicates that the time will be none too soon when *Miranda*, as variously construed and extended as in this case, and as applied via an automatic exclusionary rule as a constraint on federal and state prosecutions, is overruled.

CONCLUSION.

Wherefore, the Commonwealth respectfully requests that this petition for a writ of certiorari be granted.

Respectfully submitted,

JAMES T. RANNEY,
Assistant District Attorney,
MILTON M. STEIN,
Assistant District Attorney,
Chief, Appeals Division,
JAMES D. CRAWFORD,
Deputy District Attorney for Law,
RICHARD A. SPRAGUE,
First Assistant District Attorney,
ARLEN SPECTER,
District Attorney.

APPENDIX "A."

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

(Criminal Trial Division)

COMMONWEALTH	:	OCTOBER SESSIONS 1969
vs.	:	
SYLVAN COHEN	:	2887 to 2891

COMMONWEALTH	:	OCTOBER SESSIONS 1969
vs.	:	
STEPHEN ALTMAN	:	2892

COMMONWEALTH	:	OCTOBER SESSIONS 1969
vs.	:	
NATIONAL LAND	:	
AND INVESTMENT	:	
COMPANY	:	2893 to 2896

Philadelphia, Pennsylvania, 10 September, 1971
Room 275 City Hall

Before: HON. JOSEPH L. McGLYNN, JR.

EXCERPT

(Rulings of the Court on Motions.)

APPEARANCES:

RICHARD A. SPRAGUE, Esq., for the Commonwealth.

SCHNADER, HARRISON, SEGAL & LEWIS. By: W. BRADLEY WARD, Esq., for Defendant Sylvan Cohen.

WOLF, BLOCK, SCHOOR & SOLIS-COHEN. By: RAYMOND J. BRADLEY, Esq., for Defendant National Land.

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(2) THE COURT: All right.

I think the first order of business is the ruling on the motion of Sylvan Cohen to quash the indictment.

Mr. Ward, I am going to tell you that I did receive your supplemental memorandum, and I read it. I considered the arguments of counsel, have read the briefs, and it is my judgment that the motion of defendant Sylvan Cohen to quash the indictment should be denied. The crucial issue here is whether the failure of the Judge who administered the oath to state to the witness that according to McCloskey ". . . that should a problem arise while he is in being interrogated or should he be doubtful as to whether he could properly refuse to answer a particular question, the witness can come before the Court and obtain a ruling" compels the suppression of the witness' testimony before the Grand Jury.

Now, the obvious purpose of such an instruction is so that the witness will be informed and does have knowledge of his rights when appearing before an Investigating Grand Jury. The record in this case shows that the witness had

such knowledge and demonstrated it by exercising the very right (3) which he now contends he should have been informed about. I have specific reference to the defendant's appearance before the Grand Jury on September the 30th, 1969 where he refused to answer certain questions, and interrupted the proceedings to seek out the supervising Judge and obtain a ruling, which ruling, incidentally, was in his favor.

Where a person demonstrates that he has knowledge of his rights by exercising them, it seems to me it would be a useless act to require that he also be told of these rights.

Now, I have not overlooked the fact that the defendant demonstrated his knowledge of his rights or the rights available to him on September the 30th, 1969, and that in fact he had made a previous appearance before the Grand Jury on August the 26th, 1969. Nevertheless, in the absence of any evidence to the contrary, in my judgment, the exercise of his rights on September the 30th was sufficient to create an inferrence that he had the same knowledge on August the 26th, 1969.

That is my ruling, gentlemen.

MR. WARD: Sir, I realize that Your Honor (4) has studied the matter carefully, and you have heard oral argument and have had the opportunity to study the briefs, I must say, in all candor, sir, that my views with respect to the approach that Your Honor has taken to the critical aspect of the matter are at variance with Your Honor's ruling, and I would be prepared, if Your Honor would be willing to entertain it, to make a verbal [further] oral argument in support of my viewpoint.

THE COURT: You argued your point ably and well. There is no case that I have been able to find precisely on point. I think it is a case of first impression, at least so far as I am concerned.

MR. WARD: I wonder if I might refer to authorities that have come to my attention since the argument, sir. It is the case of Spevack vs. Klein, which was decided by the the Supreme Court of the United States, 385 U. S. 511.

THE COURT: That is the one where the Court said that lawyers have the same rights as anybody else.

MR. WARD: Yes. And Constitutional provisions for the security of person and property should be liberally construed. A close and literal (5) construction deprives them of half their efficacy and helps to gradual depreciation of the right, as if it consisted more in form than in substance. And I would only urge upon the Court ——

THE COURT: That very point, it seems to me, is pertinent here. We should be more concerned with substance than we are with form. And I know of no case where a man has actually exercised his rights and it has been ruled that nevertheless he should have been informed of them.

MR. WARD: Well, sir, I would like to point out that with respect to that aspect of September 30th, 1969 testimony, that was not, I submit, as I believe the record will show, an exercise by Mr. Cohen of his right against self-incrimination. He took that position because he considered it to be something beyond the ambit of the investigation, not a proper subject of inquiry within the scope of the Grand Jury's function, and chose not to speak about it. And I believe it was the District Attorney who sought a meeting with Judge Sloan with respect to that aspect of the matter. I would emphasize that that happened on September 30th. He had given, without any warnings, which the Supreme Court has held he is (6) entitled to, on August 26th. And all of that found its way into the presentment, and in turn into the indictment. I think that it would be resorting, sir, more to inference and implication to deprive him now of the right to warnings to argue that because of this isolated

transaction that happened 30th of September that this in some way supplies the warning he should have had before he went into that room.

THE COURT: Let me say this. You are absolutely correct. I am inferring that he had this knowledge on August 26th, 1969 as a result of the evidence that he exercised his right on September 30, 1969. There is no question in my mind, I want to make that absolutely clear on the record, that I am drawing an inference, for whatever that is worth. And I might point out, also, that McCloskey does not require that you specifically tell the witness of his rights against self-incrimination. In sustaining the indictment of Blatstein as pointed out in the footnote, No. 29, beginning on page 140, the Court approved this simple statement; if there is any question or any problem or questions, it will be brought before the Court, period. That is the only (7) additional instruction which the supervising Judge gave to Blatstein, which he did not give to the other witness whose indictments were quashed. Very, very short statement.

MR. WARD: With all deference, sir, I read McCloskey differently. I read it to require admonition by the Court, acting formally, in pursuance of his duty to a subpoenaed witness, to tell him of his rights to remain silent and of his right not to incriminate himself, and he should be fully informed of those rights whether he is a lawyer or not a lawyer. And the record is void in respect of these warnings.

Well, sir, I am not going to tax Your Honor.

THE COURT: You may be correct. What you say goes beyond the language of McCloskey.

MR. WARD: I think that is the fair intent of it. But I certainly don't want to tax Your Honor with further argument on it, unless Your Honor ——

THE COURT: I realize how important it is to you and your client and the District Attorney and everybody involved.

MR. WARD: It is a matter, sir, of the (8) greatest importance, as I am sure Your Honor, as an experienced lawyer and Judge will, especially as Your Honor has said. And I regard it as so important that I would now speak frankly to Your Honor and to the District Attorney and say that I would now be inclined to seek appellate review of Your Honor's ruling, which I think in the context of this case we are entitled to before trial on the merits, because I think a matter of this sort ought to be definitively adjudicated before a man is put to the ordeal and the expense and the burden and the anguish of the trial.

THE COURT: You may be correct.

Let me ask you this, Mr. Ward: Is there any provision in the new Appellate Court Procedure Act for interlocutory appeals in criminal matters?

MR. WARD: There is a provision. And I will rely on my friend, Mr. Bradley, who is an expert in this field, who says that an interlocutory appeal in a criminal case may be taken if allowed, as I understand the language of the ruling.

THE COURT: I know it says that in civil cases the Court below will have to certify.

MR. BRADLEY: The question is general. It does not make a distinction between civil or (9) criminal cases, is the way I read it. Doesn't say. Just, it has a section headed "Interlocutory Appeal." Just that point, without anything saying civil cases.

MR. WARD: I would also contend, sir, that in the unusual context of the legal problem here, this would not be an interlocutory appeal, because I think that, if we are right, it goes to the very foundation of the prosecution. And there are cases, for example, first of all, that hold that where an indictment is defective on its face and a motion to quash is denied, an appeal will lie. I can give Your Honor the citations there. I don't contend here in this phase of the case at this moment that these indictments are defective on their face. I am talking about the cases that hold that you may appeal from the denial of that motion to quash where from the four corners of the indictment it is manifest that there has been no offense committed. On the other hand—and there have been so many changes in the criminal law of late that it is a changing scene and pattern all the time. I am referring now to Kilgallen, Commonwealth vs. Kilgallen, with which Your Honor is familiar, and which was referred to at length in the McCloskey (10) opinion. And in that case a defendant who had appeared before a Grand Jury and testified was subsequently indicted and was permitted because of—quote—the exceptional circumstances—unquote—to have the propriety of his indictment reviewed by the Supreme Court of Pennsylvania. And I will therefore urge that it would be a perfectly practicable legal matter to have this reviewed. And I seek such a remedy. And I put this before Your Honor in all seriousness and in all good conscience and pursuant to what I see as my sworn duty to my client, I think it is sound and based upon solid reason. And I would seek an opportunity to have it tested, because I feel so strongly about it, and I am so convinced of the rectitude of my position.

THE COURT: Well, I just don't know the answer, whether or not you are entitled to appeal. My present inclination is to say that you have no such right, because there are interlocutory appeal procedures in criminal cases

set forth in the rules, and specifically I think the District Attorney has the right to appeal from an adverse ruling on motions to suppress evidence. Otherwise I know of no right to an interlocutory appeal in a criminal (11) case.

Let me say this, Mr. Ward. I certainly cannot prevent you from filing whatever paper you wish in whatever court you wish.

MR. WARD: I am sure Your Honor appreciates my position.

THE COURT: It requires a determination from me that the matter ought to be certified, that is; if it is concluded that it is appealable at this point, and requires a certification from me that I will have to reach that point.

MR. WARD: Yes, sir. There are some more aspects of this that I shall want to study. Basically my point is this: We have before the Court at this juncture a factual contention, upon the basis of which, if we are right, as a matter of law this prosecution will end right now. And that is the basis of my contention.

THE COURT: Well, I say that that is the case in any criminal prosecution, if a motion to quash is sustained. Of course it prevents the prosecution—the difficulty is this, if you were to allow, say, this case, then there would be no reason to refuse it in every other case which comes before the Court, except for the fact that this (12) raises perhaps a peculiar or unique question of law, which I said before. At least, so far as I am concerned, it is a matter of first impression.

MR. WARD: You see the situation stems out of the same Grand Jury investigation which was the subject of inquiry in McCloskey. And the matters considered in McCloskey were somewhat new in the sense that they had not been the subject of direct and immediate concern with

the Supreme Court. And I would think that there is a basis upon which the recent and sound argument could be made for appellate review. And I certainly seek that.

THE COURT: I would certainly appreciate an appellate review. Although I am certainly convinced that my judgment is correct. We all look for guidance from our appellate courts to sustain my ruling or tell me what the proper ruling should have been. But, nevertheless, I think we are just—you may be right, it might be an appropriate case for appellate review. Now, my only problem is whether you can obtain an appellate review now, how to put the case in such a posture to obtain an appellate review. I don't know. Certainly on the cases, as I understand them, the proceedings, the indictments were dismissed, was a final order so far (13) as those cases were concerned.

MR. WARD: Sure.

THE COURT: Now this case is a little different. The indictments are not dismissed, they are still outstanding. So that the order is interlocutory.

MR. WARD: Well, it all depends on whether in the context of this case you can properly call it interlocutory in the light of what happened in Kilgallen.

MR. BRADLEY: The Kilgallen case arose, the defendant made a motion to quash in the lower court, which was denied, took his appeal to the Supreme Court, and the Supreme Court specifically allowed the question of whether he had a right to appeal, and decided that he did. It grew out of the Grand Jury.

THE COURT: I am familiar with another area where an interlocutory appeal was permitted, and that was a case where the 180 Day Rule, not the Rule, the Statute, where a Judge ruled that the 180 Day Rule was not self-executing,

and therefore that the defendant should go to trial. So the defendant appealed to the Supreme Court, and the Supreme Court said: Yes, it is self-executing. And they, (14) of course, dismissed the indictment. So, for whatever solace that is—incidentally, that came down a few months ago, Commonwealth vs. Darrell Bell,

MR. SPRAGUE: Darrell Bell, Your Honor.

THE COURT: It wasn't my ruling that was reversed.

MR. BRADLEY: As far as my client National Land is concerned, where we had a motion to quash also, somewhat different grounds although Mr. Ward also had the same grounds—he had a double barrel—I join in his remarks with respect to the desirability and I think the right to appellate review on this case, insofar as National Land is concerned.

THE COURT: Well, no amount of agreement by me can change the law. If the law authorizes an appeal, you go ahead and appeal; if the law doesn't authorize an appeal, I assume the District Attorney will try to stop you, if that is his desire.

MR. WARD: I made the statement I did, sir, just out of regard for what I think is my obligation of candor to the Court and to the District Attorney.

THE COURT: Yes. I appreciate that.

(15) MR. BRADLEY: And I am the same.

THE COURT: I understand your problem. As I say, if you feel that that is necessary and proper procedure, why, don't have any hesitation about taking whatever steps you feel are in the best interests of your clients.

APPENDIX B.

Commonwealth *v.* Cohen Appellant.

Criminal Law—Constitutional law—Evidence—Privilege against self-incrimination—Witness before grand jury—Failure of court supervising investigation to advise witness of his privilege to remain silent and of his privilege to have the advice of counsel.

Defendant, an officer of a corporation, was indicted on charges of false pretenses, false financial statements, and conspiracy with another company officer to cheat and defraud.

Defendant moved to quash the indictments brought against him and to suppress the use of his testimony before the investigating grand jury. The lower court refused to quash the indictments. On appeal to the Superior Court, the orders of the lower court were reversed and the indictments ordered to be quashed.

CERCONE, J., filed an opinion (in which SPAULDING, J., joined) in which he rendered the judgment of the court and stated, inter alia, the following:

The proper procedure is for the court supervising the investigating grand jury to instruct a witness when administering the oath that while he may consult with counsel prior to and after his appearance, he cannot consult with counsel while he is giving testimony. However, the witness should also be informed that should a problem arise while he is being interrogated, or should he be doubtful as to whether he can properly refuse to answer a particular question, the witness can come before the court accompanied by counsel and obtain a ruling as to whether he should answer the question. A subpoenaed witness who has given testimony before an investigating grand jury without the above warning has been denied his right against self-incrimination.

The fact that defendant is an attorney does not obviate the necessity for the requisite warnings and instructions. Circumstantial evidence of the accused's knowledge of his rights based on his intelligence and education cannot take the place of the actual instruction as to his privileges. The only way this essential right to counsel can be waived is by giving specific instructions to the accused informing him of his rights and then by having the accused make an intelligent waiver of such rights.

Defendant's testimony was received in violation of his constitutional rights and could not serve as the basis, in whole or in part, of any of the indictments entered against him. Those indictments, therefore, cannot stand.

WATKINS, MONTGOMERY, and JACOBS, JJ., concurred in the result.

WRIGHT, P. J., would affirm on the order below.

HOFFMAN, J., took no part in the consideration or decision of this case.

Argued December 8, 1971. Before WRIGHT, P. J., WATKINS, MONTGOMERY, JACOBS, SPAULDING, and CERCONE, JJ. (HOFFMAN, J., absent).

Appeals, Nos. 1643 to 1647, inclusive, Oct. T., 1971, and Nos. 17 to 21, inclusive, Oct. T., 1972, from orders of Court of Common Pleas, Trial Division, of Philadelphia, Oct. T., 1969, Nos. 2887 to 2891, inclusive, in case of Commonwealth of Pennsylvania v. Sylvan M. Cohen. Orders quashed.

Proceedings upon applications to quash indictments. Before MCGLYNN, JR., J.

Orders entered dismissing petitions to quash indictments. Defendant appealed.

W. Bradley Ward, with him *Abraham L. Shapiro*, and *Schnader, Harrison, Segal & Lewis*, for appellant.

James D. Crawford, Deputy District Attorney, with him *Martin H. Belsky* and *Milton M. Stein*, Assistant District Attorneys, *Richard A. Sprague*, First Assistant District Attorney, and *Arlen Specter*, District Attorney, for Commonwealth, appellee.

OPINION BY CERCONE, J., March 24, 1972:

These appeals by Sylvan M. Cohen are companion to that of the case of *Commonwealth v. National Land and Investment Company*, 221 Pa. Superior Ct. 144, A. 2d (1972). Cohen, officer of National Land and Investment Company, was also indicted on charges recommended by the April 1969, Investigating Grand Jury impaneled on petition of the District Attorney of Philadelphia to investigate, inter alia, the 1500 Market Street Project in that City.[1] The indictments against Cohen consisted of two charges of false pretense and two charges of false financial statements based on the same December 20, 1968 and January 30, 1969, transactions which constituted the basis of the recommendations and indictments against National Land and Investment Company. In addition, Cohen was indicted, pursuant to the investigating grand jury's recommendation, of the crime of conspiring with Stephen Altman,[2] another company officer, to cheat and defraud the Redevelopment Authority and owners of real estate in the 1500 Market Street Project.

Cohen moved to quash the indictments brought against him and to suppress the use of his testimony before the investigating grand jury. These motions were based on

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[1] As more fully set forth in our decision in the **National Land and Investment** case.

[2] Altman's motion to quash his indictment was granted by the court below.

the contention, inter alia, that his testimony before the investigating grand jury was tainted by the failure of the court supervising the investigation to advise him of his Fifth Amendment privilege to reman silent in the face of incriminating questions and of his Sixth Amendment privilege to have the advice of counsel. The lower court did not agree and refused to quash the indictments. It certified as appropriate for appeal to this court under Section 501 of the Appellate Court Jurisdiction Act of 1970, 17 P. S. Section 211.501, that part of its order dealing with the admissibility of appellant's testimony before the grand jury and the denial of a motion to quash because of that admissibility. However, appellant Sylvan M. Cohen has not so limited his appeals to this court, but has also presented to us the argument that the indictment based on the investigating grand jury's recommendation improperly denied him his right to a preliminary hearing because the recommendations of the investigating grand jury were beyond the scope of its authority.

With respect to the issue certified to us on appeal as to this individual appellant Sylvan Cohen, there was a violation of his constitutional rights in the presentation of his testimony before the investigating grand jury, which violation invalidated that testimony and prevented its use as the basis for the indicting grand jury's finding of a true bill against him. The issue certified to us for a ruling is stated by the lower court in its certification to be: ". . . the failure of the judge supervising the investigating grand jury to specifically instruct the defendant that should a problem arise while he is being interrogated or should he be doubtful as to whether he can properly refuse to answer a particular question, he can come before the Court accompanied by counsel and obtain a ruling as to whether he should answer the question." It is our determination that appellant was entitled to such instructions and that he had not waived his right to them.

In *Commonwealth v. Kilgallen*, 379 Pa. 315, 108 A. 2d 780 (1954), it was held that where a witness appeared before

the grand jury, testified under judicial compulsion in violation of his rights pursuant to the Fifth Amendment and Article I, Section 9 of the Pennsylvania Constitution against self-incrimination, his indictment should be quashed. Mr. Justice CHIDSEY there stated: ". . . *we know of no case in this jurisdiction that denies the right to challenge the validity of an indictment on the ground of violation of the accused's constitutional rights here asserted*—and so challenge successfully upon proper and sufficient proof." (pp. 325-26) (Emphasis supplied.)

The *Kilgallen* decision was found to be "still valid" in *Commonwealth v. McCloskey*, 443 Pa. 117, 277 A. 2d 764 (1971), which held that a witness before this very same April 1969 Investigating Grand Jury was entitled to instructions as to his right against self-incrimination and advice of counsel as follows (p. 120): ". . . *we do believe that a witness should receive a warning by the court in charge of the investigating grand jury that if the witness is confused or believes his answer might be incriminating, he may come before the court accompanied by counsel and be advised of his rights.* This procedure was not followed with reference to certain of the individual appellees now before us. Accordingly, those indictments *in any way* based upon a defendant's own testimony given without this warning and in violation of his right against self-incrimination must be quashed." (Emphasis supplied.) The court reasoned: ". . . in In re Groban's Petition, supra, the Supreme Court also stressed that a witness before a grand jury is always protected by the privilege against self-incrimination, '. . . a privilege available *in investigations as well as in prosecutons.*' Id. at 333, 77 S. Ct. at 513 (emphasis added) . . . In seeking to balance society's interest in the grand jury's freedom of orderly inquiry and a witness's right to exercise his privilege against self-incrimination knowingly and intelligently, *we believe that proper procedure is for the court supervising the investigating grand jury to instruct a witness when administering the oath that while he may consult with counsel prior to and after his appearance, he can-*

not consult with counsel while he is giving testimony. However, the witness should also be informed that should a problem arise while he is being interrogated, or should he be doubtful as to whether he can properly refuse to answer a particular question, the witness can come before the court accompanied by counsel and obtain a ruling as to whether he should answer the question. (Emphasis supplied.)

"Such a warning gives full recognition to the delicate position of a witness before an investigating grand jury. He has been summoned to testify, and he is subject to contempt proceedings should he refuse to testify without justification. The question of when a witness has 'reasonable cause to apprehend danger' and hence can exercise his right against self-incrimination is not always clear.

"Determining what is an incriminating statement is not always clear to a layman. *We thus conclude that a subpoenaed witness who has given testimony before an investigating grand jury without the above warning has been denied his right against self-incrimination.*" (Emphasis supplied.) The fact that appellant is an attorney did not obviate the necessity for the requisite warnings and instructions. The language of the United States Supreme Court in *Miranda v. Arizona*, 384 U. S. 436 (1966), makes clear that circumstantial evidence of the accused's knowledge of his rights based on his intelligence and education cannot take the place of the actual instruction as to his privileges. The court there stated: "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, *whatever the background of the person interrogated*, a warning at the

time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." (Emphasis supplied.)

The court in *Miranda* was also clear as to the duty to advise an accused of his right to counsel regardless of circumstances indicating his knowledge of such right, saying at pages 471-472: "Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer. . . . As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right."

In *United States v. Harrison*, 451 F. 2d 1013 (2d Cir. 1971), the court in a per curiam opinion held that the rights of the appellant, an attorney, had been violated by the court's failure to instruct him of his constitutional rights, saying: "Here the record fails to show any advice to or inquiry of appellant on the date of trial or shortly before it by the trial judge on the subject of his right to be defended by counsel at trial or any finding that appellant made a knowing and intelligent waiver of that right. The fact that appellant is an attorney does not necessarily mean that he is capable of adequately defending himself. The mere statement by the appellant in response to the trial judge's questions (*six months aftr trial* at the time of sentencing) that he was a member of the bar since 1943 and was reasonably familiar with criminal law (Trial Record II at 7-8) is not sufficient to constitute a waiver of his Sixth Amendment right to counsel at trial. See Glasser v. United States, 315 U. S. 60, 70-71 (1942)."

It is not unreasonable to require that any necessary instructions be given to an attorney, for not all attorneys are

familiar with criminal law and the constitutional rights afforded thereby.

The Commonwealth argues that the *McCloskey* instructions are not based on the *Miranda* case, supra, and *Escobedo v. Illinois*, 378 U. S. 478 (1964), and therefore the *McCloskey* decision should be interpreted by its own limiting statement above quoted as applying to a "layman" and this excludes an attorney from availing himself of the rights there stated to exist as to all other witnesses. We can find no reason for so distinguishing between the necessity of the *McCloskey* instructions and the *Miranda* and *Escobedo* warnings. To hold the *McCloskey* instructions need not be given to an attorney while the *Miranda* and *Escobedo* warnings are required to be, is to make a distinction without basis. Nor can we agree with the Commonwealth's contention that the *McCloskey* decision is not controlling, having been handed down after appellant had appeared as a witness before the investigating grand jury. The Commonwealth claims that reliance on the *McCloskey* decision would be to give improper retroactive effect. We cannot agree. The *McCloskey* decision determined the rights of witnesses before the same April 1969 investigating grand jury. It would be unfair and without logic to deny this appellant the same rights merely because at the time he testified the decision affirming those rights on appeal by a similarly situated party had not yet been finally determined by the appellate courts.

The court below indicated it was of the opinion that the lack of instructions was immaterial in that defendant had knowingly exercised the rights that would have been covered by the instructions. The court below placed reliance on the fact that appellant at one time during his testimony before the investigating grand jury hesitated implicating a third party by his answer and thereupon the District Attorney went to the court for a ruling. We do not agree that such conduct can be availed of as proof of defendant's knowledge of his rights because (1) as above shown, circumstantial proof cannot take the place of specific instruc-

tions; (2) his hesitancy to implicate others bore no relatio to and had no effect on his conception of his right agains self-incrimination; and (3) at the time appellant hesitate implicating a third party he was without knowledge tha he was no longer a mere witness but had become a subje of investigation though not named as such in the petitio Nor can such conduct by appellant be construed as a waive of his right to the necessary instructions. As stated by th Court of Appeals in *United States v. Harrison*, supra: "Th only way this essential right to counsel can be waived by giving *specific* instructions to the accused informin him of his rights and then by having the accused make a intelligent waiver of such rights. Carnley v. Cochran, 36 U. S. 506, 516 (1962); Miranda v. Arizona, 384 U. S. 43 470-471, 475 (1966); United States v. Curtiss, 330 F. 2d 27 279-280 (2d Cir. 1964)." (Emphasis supplied.)

We therefore conclude that appellant's testimony was r ceived in violation of his constitutional rights and coul not serve, as the record reveals it did, as the basis, in whol or in part, of any of the indictments entered against hin Those indictments, therefore, cannot stand.

For the reasons stated in this opinion the orders of th court below are reversed and the indictments entered Nos. 2887-2891, inclusive, October Term, 1969, in the Cou of Common Pleas of Philadelphia, Trial Division, a hereby ordered quashed.

SPAULDING, J., joins in this opinion.

WATKINS, MONTGOMERY, and JACOBS, JJ., concur in th result.

WRIGHT, P. J., would affirm the order below.

HOFFMAN, J., took no part in the consideration or dec sion of this case.

APPENDIX C.

SUPREME COURT OF PENNSYLVANIA
Eastern District.

Patrick N. Bolsinger
Prothonotary
George W. Dunn, Jr.
Deputy Prothonotary

Philadelphia 19107
May 26, 1972

Milton M. Stein, Esq.,
Assistant District Attorney
Chief, Appeals Division
Room 666 City Hall
Phila., Pa. 19107

In re: Commonwealth of Pennsylvania,
Petitioner v. Sylvan M. Cohen
No. 498 Allocatur Docket
(Nos. 1643/1647 October Term 1971
Nos. 17/21 October Term 1972)

Dear Mr. Stein:

Please be advised that the Court has entered the following Order on the Petition for Allowance of Appeal from the Judgment of the Superior Court, in the above captioned matter:

"May 24, 1972
Petition Denied
Per Curiam."

Yours very truly,
GEORGE W. DUNN, JR. (s)
Deputy Prothonotary

GWDJR:mb
CC: M. Bradley Ward, Esq.